STATE OF MICHIGAN

IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

v

NATIONAL HERITAGE ACADEMIES, INC.,

Defendant-Appellant.

_____/

Supreme Court No. 150616

Court of Appeals No. 306870

Genesee County Circuit Court
Case No. 10-93161-CL

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APPELLANT NATIONAL HERITAGE ACADEMIES, INC.'S APPEAL BRIEF

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction to hear this appeal of the Court of Appeals' judgment entered on October 28, 2014, under MCR 7.301(A)(2). The Court of Appeals opinion affirmed a Genesee County Circuit Court judgment awarding more than $535,000 to Plaintiff Craig Hecht after Defendant National Heritage Academies, Inc., fired Hecht for making a racist "joke" in a classroom full of third graders and interfering with NHA's investigation of the incident. NHA timely applied for leave to appeal on December 9, 2014. The Court granted leave to appeal on September 16, 2015.

The Court of Appeals had jurisdiction under MCR 7.203(A)(1) to hear and decide NHA's appeal from the Genesee County Circuit Court's August 8, 2011 Judgment and October 5, 2011 order denying NHA's motion for granting summary disposition on all claims in favor of Defendants. NHA timely appealed the circuit court's judgment on October 25, 2011.

NHA respectfully requests this Court reverse the lower court and enter judgment as a matter of law in favor of NHA.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a person's summary of what she *understood* a decision-maker *meant*—as opposed to evidence of what the decision-maker *actually said*—constitutes "direct evidence" of intentional discrimination where even the summary is subject to multiple reasonable interpretations.

Court of Appeals says:	Yes
Plaintiff Hecht says:	Yes
Defendant National Heritage Academies says:	No

Trial court did not address this issue.

2. Whether Plaintiff Hecht, who made a racist "joke" in a classroom full of schoolchildren that was brought to the Defendant's attention through coworker complaints and who then tried to impede Defendant's investigation, was similarly situated to non-Caucasian coworkers who engaged in racial banter in settings where children were not present, whose conduct was not brought to Defendant's attention, and who did not impede any investigation.

Court of Appeals says:	Yes
Trial court says:	Yes
Plaintiff Hecht says:	Yes
Defendant National Heritage Academies says:	No

3. Whether MCL 380.1230b, which immunizes an employer from "any liability" for disclosing a former employee's unprofessional conduct to schools, nonetheless allows a terminated employee to use such a disclosure to inflate his damages against the school.

Court of Appeals says:	Yes
Trial court says:	Yes
Plaintiff Hecht says:	Yes
Defendant National Heritage Academies says:	No

INTRODUCTION

Plaintiff Craig Hecht, a white teacher, made a racial "joke" in front of his third-grade class that "white is better than brown" and "[b]rown should burn." An African American special-education paraprofessional and a white library aide both reported Hecht's comments to their employer, Defendant National Heritage Academies. When NHA investigated, Hecht begged the paraprofessional to change his statement. Hecht also left phone messages for the library aide that she did not return. NHA ultimately ended its employment of Hecht because he made inappropriate racial statements in front of students and interfered with the school's investigation. Yet a jury awarded Hecht more than $535,000 for racial discrimination, accepting Hecht's argument that he was treated less favorably than African-American coworkers who sometimes bantered with each other outside the presence of children.

A non-lawyer might say that this case represents everything that is wrong about our legal system: a school cannot fire a teacher even after the teacher makes racist remarks in a classroom full of children and then tries to interfere with the school's investigation into the incident. But for three reasons, the case's jurisprudential significance is far greater than simple injustice.

First, the Court of Appeals' panel majority treated circumstantial evidence as direct evidence of discrimination. When a plaintiff has no direct evidence of discrimination, he must satisfy the burden-shifting framework the U.S. Supreme Court set forth in *McDonnell Douglas v Green*, 411 US 792 (1973). In contrast, direct evidence that discriminatory animus caused the adverse employment decision allows a plaintiff to skirt the *McDonnell Douglas* framework, and shift the burden of proof to an employer to prove that the employer would have taken the same action in the absence of any unlawful animus. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). The Court of Appeals concluded that Hecht presented direct evidence in the

form of another employee's testimony that she *understood* a comment from school principal Linda Caine-Smith to mean that racial bantering happened at the school among African-American employees but not the other way around. As Judge Wilder explained in his dissent, what the employee *thought* Caine-Smith meant is not "direct evidence" of discrimination:

> [Corinne] Weaver's testimony is not direct evidence of discrimination because it did not recount an actual statement by Caine-Smith. *Nothing* in the record establishes what Caine-Smith actually said to Weaver, and Caine-Smith denied saying directly, or by implication, that statements made by African American employees should be treated differently than statements made by white employees. As such, Weaver's testimony constitutes, at best, Weaver's interpretation of what Caine-Smith *may* have meant by what she said. [COA Dissent 3, App 361a.]

As a result, "Weaver's summation of what Caine-Smith allegedly said cannot *on its face* establish that plaintiff's race was a factor in Caine-Smith's decision to terminate plaintiff." (*Id.*)

Nonetheless, the panel majority concluded that what Weaver *thought* Caine-Smith meant was direct evidence, even though the evidence was subject to multiple reasonable interpretations. Indeed, the majority's analysis demonstrates that Weaver's testimony, if believed, does not require the conclusion that discrimination occurred. This Court should clarify that testimony regarding what someone thought an ambiguous statement meant is not direct evidence.

Second, the Court of Appeals expanded the scope of when an employee is "similarly situated" to another employee well beyond the limits imposed by this Court. The determination of whether the plaintiff is similarly situated dictates whether the comparison is relevant in a jury's determination of whether employment discrimination has occurred. In *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997), this Court explained that for a coworker to be similarly situated to a plaintiff, the two must be "nearly identical" in all relevant aspects. Here, Hecht claims that he is similarly situated in all relevant respects to African-American employees who engaged in outside-the-classroom bantering that involved race. But

these situations are not even similar, much less "nearly identical." None of the bantering Hecht identified was made in a classroom during instructional time in front of children. None of the bantering Hecht identified was reported to NHA decision-makers. And none of the bantering Hecht identified involved an employee interfering with NHA's investigation. Tellingly, Hecht admits that he made remarks about burning brown tables using "brown tables" as proxy for dark-skinned people; admits that NHA should have disciplined him; and admits that the African Americans who engaged in bantering should *not* have been disciplined. It is not possible to say that Hecht was "similarly situated" to the employees who engaged in the bantering under this Court's decision in *Town*. This Court should reaffirm that "similarly situated" means "nearly identical" in all relevant respects, including the type and severity of misconduct.

Third, Hecht was able to inflate his damages by arguing to the jury that he could never obtain another job as a schoolteacher because the Revised School Code requires NHA to report his unprofessional conduct to any school that considers hiring him. MCL 380.1230b. But state law is supposed to grant NHA immunity from "*any* liability" for making the required disclosure about Hecht's inappropriate classroom behavior; and pursuant to that same law, Hecht released NHA from any liability for disclosing accurate information about his racist remarks. In allowing Hecht to nonetheless use NHA's mandatory disclosure to inflate his damages, the lower courts penalized NHA for complying with state law, contrary to the statute's plain language and the broad grant of immunity the Legislature intended. When other schools learned the truth of what Hecht undeniably did, they would not hire him. NHA should not be penalized for the natural consequence of Hecht's racist comments.

For all these reasons, and those explained in more detail below, the Court should reverse the Court of Appeals and direct the entry of judgment in favor of NHA.

BACKGROUND

The parties

National Heritage Academies, Inc. owns and operates Linden Charter Academy, a "Public independently owned school" that seeks to "offer every student, no matter where they come from, the opportunity for college." (Caine-Smith Tr 169-170, App 175a-176a.) NHA's educational philosophy consists of four pillars, one of which is the moral education of its students. (*Id.* at 170, App 176a.) NHA does not believe that it "can just educate somebody's mind" but that schools must consider a student's "heart and character." (*Id*.) NHA schools emphasize nine moral virtues each school year. (*Id*. at 171, App 177a.) Among these are "respect" and "integrity." (*Id*.) NHA expects every person it employs to "exemplify those moral virtues" and NHA's teachers are expected to "model the characteristics of behavior as outlined in the moral focus curriculum." (*Id*. at 171-172, App 177a-178a.)

The Academy is a primarily African-American school in Flint, Michigan. (*Id.* at 172, App 178a). It has a "zero tolerance policy about racial intolerance." (Def Ex 24, App 332a).

NHA employed Hecht, a white male, as an at-will teacher and administrator for eight years. (Hecht Tr 222-223, App 65a-66a.) For much of that time Hecht was a teacher. (*Id.*) He was teaching in a third-grade classroom when he made the racist comments that ultimately led to the termination of his employment.

Hecht's racist remark in classroom full of schoolchildren

On November 3, 2009, Lisa Code, a white library aide, entered Hecht's third-grade classroom to return a computer table. (*Id.* at 222, 228, App 65a, 69a.) The classroom was full of eight and nine year-old children. (Code Tr 98, App 133a; Bell Tr 124, App 156a.) Floyd Bell, an African-American paraprofessional, was also in the classroom. (Bell Tr 122, App 154a.)

After Code realized that she had brought back the wrong color table, she asked Hecht whether he wanted a white table, as before, or the brown table she had brought. (Hecht Tr 228, App 69a.)

Hecht told Code, "You know I want a white table, white tables are better." (*Id*. at 229, App 70a; Code Tr 73, App 116a.) Despite Code and Bell both calling a "foul"[1] on Hecht (Code Tr 74, App 117a; Bell Tr 125, App 157a), he declared that "[w]e need to get rid of the brown tables" and "[w]e can take all these brown tables and we can burn the brown tables" (Hecht Tr 229, App 70a; Hecht Tr 38-39, App 96a-97a). Hecht even involved a child in the conversation. (*Id.*; Code Tr 75, App 118a; Def's Ex 10, Bell's Statement, App 326a.)

Hecht later acknowledged what was immediately apparent to Bell and Code: his comments referred to race and were intended to mean that *white people are better than brown people*. (Hecht Tr 37, 43, App 95a, 101a; Unwin Tr 12, App 240a; Code Tr 74, 95-96, App 117a, 130a-131a; Bell Tr 123, 125-126, App 155a, 157a-158a.) And Hecht made this offensive and racially-targeted remark knowing that it was deplorable to make racial jokes in front of third-grade students. (Hecht Tr 56, App 107a; Code Tr 102, App 137a.)

Investigation of Hecht's racist statement

Later that same day, Code reported the incident to Corrine Weaver, the Academy's dean. (Weaver Tr 148, App 37a.) Weaver reported the complaint to her supervisor, Linda Caine-Smith, the Academy's principal, who initiated an investigation. (*Id.* at 151-152, App 40a-41a; Caine-Smith Tr 177, App 183a.)

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[1] The staff and students at the Academy created a "social contract," an understanding regarding how they would treat each other and expect to be treated by others. (Hecht Tr 34-35, App 92a-93a.) If someone broke the rules established by the social contract, school employees call a "foul" on that person. (Hecht Tr 234, App 73a.) The person on whom the foul is called is supposed to respond by stopping the offensive conduct and giving two ups, which means making two positive comments about the person who called foul. (Weaver Tr 179-180, App 51a-52a.)

Caine-Smith and Weaver separately met with Bell, Code, and Hecht, and received written reports from each. (Caine-Smith Tr 177, App 183a; Weaver Tr 142-144, 148-149, 172, App 31a-33a, 37a-38a, 46a.) Bell and Code provided consistent reports that identified that Hecht's comments included that "brown should burn" and that white was better than brown. (Weaver Tr 142-144, 172, App 31a-33a, 46a; Def's Ex 10, App 326a; Def's Ex 9, App 325a.) They both also stated that Hecht had involved a student. (Weaver Tr 143, App 32a; Def Ex 10, App 326a.)

Hecht's story varied. In his first meeting with Weaver, Hecht confirmed the general discussion of white and brown tables but denied he had meant his comments to be racist. (See Weaver Tr 148-149, App 37a-38a.) The next day, Hecht told Caine-Smith that he had not said that "brown should burn" at all. (Caine-Smith Tr 183, App 189a.) Then, a few hours later, Hecht sent Caine-Smith a written statement admitting that, yes, he had indeed said "white tables are better than brown tables" and that "all brown tables should burn." (Def's Ex 11, App 328a.) And Hecht admitted that he had intentionally involved a nearby student, asking the third-grader "Right?" after making his comments about white being better than brown. (*Id.*)

After engaging in this initial investigation, Caine-Smith was concerned that Hecht had made racist remarks in a classroom of third graders and persisted in doing so even after being challenged by Bell and Code. (Caine-Smith Tr 179, 181, App 185a, 187a.) So Caine-Smith turned for help to Courtney Unwin, NHA's Employer Relations Manager. (*Id.* at 183, App 189a.) Caine-Smith told Unwin that she believed Hecht had "clearly lied" during their first conversation based on the fact that his story changed so markedly between their meeting and Hecht's later submission of his written statement. (Def's Ex 14, App 329.)

Unwin also spoke with Hecht, and he changed his story yet again. (Unwin Tr 11-12, App 239a-240a.) Hecht now characterized his remarks as just a "tasteless joke." (*Id*. at 12, App 240a; Def's Ex 3, App 324a.) Contradicting his written statement, Hecht claimed that there were no children by him and that no children heard him when he made his racist comment. (*Id*.) Later that day, Hecht called Unwin again, this time claiming that he could not even remember saying anything about brown tables burning. (Unwin Tr 15, App 243a.)

During the conversation with Unwin, Hecht first sought to justify his conduct by reference to incidents in which African-Americans had bantered about race. (Unwin Tr 13, App 241a; Def's Ex 3, App 341a.) Hecht told Unwin of one incident involving a picture of Dora the Explorer in the Academy's gym. (*Id*.) Hecht would not tell Unwin who was involved in that situation. (Unwin Tr 14, App 242a.) Nor did he complain at the time the incident occurred. (*Id*.) Unwin asked Caine-Smith about that incident. Caine-Smith had never heard of it and told Unwin that no one had ever complained about the comment. (*Id*.)

That same day, Caine-Smith and Unwin discussed Hecht's comments in the classroom and his untruthful reporting of the incident. They discussed several possible disciplinary options, including a final written warning and termination. (Unwin Tr 17, App 245a.) Caine-Smith then called Hecht to her office and told him his was being put on leave pending further investigation. Caine-Smith directed Hecht to leave the building immediately. (Caine-Smith Tr 184, App 190a.)

Hecht tampers with the investigation

But Hecht did not leave the building as instructed. Instead, Hecht went to the room where Bell was tutoring students and told the students to leave (cutting into their instructional time) so that he could talk to Bell. (Bell Tr 132-133, App 161a-162a; Def's Ex 15,App 330a.) Hecht asked Bell to change the statement that Bell had given to NHA. (Hecht Tr 46, App 104a;

Bell Tr 133, App 162a.) Bell responded that he would not lie for Hecht; Hecht remained silent and did not deny that he was asking Bell to lie. (Bell Tr 136-137, App 165a-166a.)

Hecht also tried to contact Code. He called both her cell phone and home phone on the evening of November 4, leaving a message that he was desperate. (Code Tr 86-88, App 121a-123a; Def's Ex 17, App 331a.) Hecht had never before called Code. (Code Tr 99-100, App 134a-135a.)

The next morning, Bell reported Hecht's actions to Caine-Smith. (Bell Tr 137, App 166a.) Bell informed Caine-Smith that Hecht's comments—asking Bell to lie—had made the previous day "one of the most uncomfortable days in my life." (Def's Ex 15, App 330a.) Concerned, Caine-Smith asked Code if Hecht had also contacted her. (Caine-Smith Tr 186, App 192a.) Code told Caine-Smith of Hecht's calls. (*Id.*; Code Tr 86-88, App 121a-123a; Def's Ex 17, App 331a.) Caine-Smith immediately contacted Unwin again. (Caine-Smith Tr 186, App 192a; Unwin Tr App 249a.)

Caine-Smith and Unwin were disturbed by Hecht's actions. First, Hecht had deliberately disobeyed a direct order to leave the building. (Caine-Smith Tr 185, App 191a; Unwin Tr 21, App 250a.) Second, Hecht interrupted individual instruction time and dismissed students from instruction to address his personal matters. (Caine-Smith Tr 185-186, App 191a-192a; Unwin Tr 22, App 250a.) Most important, Hecht tried to get Bell to change his story. (*Id.*) Both Caine-Smith and Unwin viewed Hecht's failure to protest when Bell accused Hecht of asking Bell to lie as demonstrating that was *exactly* what Hecht was doing. (*Id.*) For these reasons, Caine-Smith and Unwin concluded that Hecht was interfering with NHA's investigation. (Caine-Smith Tr 186, App 192a; Unwin Tr 54, App 282a.)

Before learning of Hecht's interference with the investigation, Caine-Smith and Unwin were considering giving Hecht a final warning and requiring him to make a public apology. (Unwin Tr 17, App 245a.) But after learning of Hecht's willful disobedience of the directive to leave the building and Hecht's interference with the investigation, they terminated Hecht for "imped[ing] the investigation." (Hecht Tr 19-20, App 81a-82a.)

Comments involving race at the Academy

It is undisputed that there was occasional racial banter and comments at the Academy. For instance, Weaver heard African Americans engage in "genuine [racial] banter" on 10-20 occasions over a decade. (Weaver Tr 177-178, App 49a-50a; Weaver Tr 107-108, App 141a-142a.) She also testified that she remembers hearing the use of the "n" word no more than three times during the same period. Significantly, no children were present during these incidents, and there was no evidence that anyone reported being offended or complained to the administration. (*Id*.) Unfortunately, Weaver was under the misapprehension that she was only required to report racist remarks if someone was offended. (Weaver Tr 170-171, App 44a-45a.)

As Hecht mentioned to Unwin, an African-American staff member once made a comment that because a Dora the Explorer mural had been painted with darker skin, she "looks more like [Lakisha]," a name that is more common in the African-American community. (Scott Tr 192, App 56a; Hecht Tr 11, App 77a; Bell Tr 144-145, App169a-170a; Caine-Smith Tr 199, App 205a; Unwin Tr 13, App 241a.) But again, no students were present who could have overheard this remark, and no one reported the incident to management. (Weaver Tr 178, App 50a; Code Tr 101, App 136a; Scott Tr 197-199, App 59a-61a; Caine-Smith Tr 188, App 194a.) Nor did anyone present take offense. (Unwin Tr 14, App 242a.) Caine-Smith had never heard of it before Hecht mentioned it. (*Id*.)

On another occasion, when Academy staff members were on a bus to a professional development meeting, an African-American staff member overheard Weaver mention that she was making pork chops for supper, and asked "[w]hy would you be making pork chops; you're white?" (Weaver Tr 136-137, App 25a-26a.) Weaver called "foul," and the staff member responded by giving her positive affirmations. (*Id.* at 178-179, App 50a-51a.) Weaver was not offended and never reported the incident to the administration. (*Id*. at 135-139, App 24a-28a.) A different African-American staff member told Weaver she should not eat soul food because she was white. (*Id*. at 139, 140, 142, App 28a, 29a, 31a.) Again, Weaver was not offended but she did call "foul." (*Id*. at 180, App 152a.) The staff member responded with positive affirmations. (*Id*.) Weaver did not complain to the administration (*Id*.)

Two additional instances were identified at trial that did not include Weaver. On one occasion an African-American staff member allegedly told Code she could not do something because she was white. (Code Tr 90, App 125a.) Code was not offended. (*Id.*) Nor did Code report the incident. (*Id.* at 91, App 126a.) And Hecht testified that he once heard an African-American secretary refer to an African-American student as "light skinned." (Hecht Tr 13, App 79a.) Hecht did not call "foul" or complain to the administration. (*Id*.) Again, NHA was unaware of these alleged incidents until this litigation.

Hecht's post-termination employment

After Hecht's employment was ended, NHA received at least one request from schools to which Hecht had applied for disclosure of unprofessional conduct. (Unwin Tr 25-26, App 253a-254a; Hecht Tr 24-26, App 86a-88a.) The Revised School Code, codifying 1996 Public Act 189, requires a school hiring an applicant to request information from an applicant's current or immediate past employer regarding any unprofessional conduct in which the applicant may have

engaged. MCL 380.1230b(2). "Unprofessional conduct" is broadly defined as, among other things, "1 or more acts of misconduct." MCL 380.1230b(8)(b). Upon receiving such a request, a school is required to provide information and documentation to the requesting school of any unprofessional conduct by the applicant. MCL 380.1230b(3). The statute provides that "an employer *shall* provide the information requested and make available to the requesting school . . . copies of all documents in the employee's personnel record relating to the unprofessional conduct." *Id.* (emphasis added).

The aim of the legislature in passing PA 189 was to "protect students by keeping teachers (and others) with a record of unprofessional conduct out of schools." House Bill 5060 First Analysis 11/8/95, 2. It had come to the Legislature's attention that "teachers can be pushed out of one district for unprofessional conduct, including sexual abuse of students, and move on to positions in other districts because secret agreements suppress information about their employment history." *Id.* In the Legislature's view, the bill would protect "employers that release such information in good faith." *Id.*

Hecht's prospective school employers requested documentation pursuant to PA 189. As the law required, NHA notified these schools truthfully that Hecht had been found to have "engaged in unprofessional conduct," "made a racially offensive statement," and "improperly attempted to induce co-workers to change their statements about the incident while employed at NHA." (Unwin Tr 24-25, App 252a-253a; Pl Ex 13, App 333a.) After learning of Hecht's racist in-classroom remarks, none of the schools to which Hecht applied offered him a position. (Hecht Tr 24-26, App 86a-88a.)

Within weeks of being fired by NHA, Hecht was working at Saginaw Valley Preparatory Academy as a substitute teacher. (*Id.* at 59, App 110a.) There was a long-term teaching position

available as the regular seventh-grade teacher. (*Id*. at 59-61, App 110a-112a.) Hecht would have been hired for this position (*id*. at 60-61, App 111a-112a), but he failed a drug test (*id.* at 59-60, App 110a-111a).

Hecht resumed substitute teaching. (*Id.* at 25, App 87a.) While Hecht worked as a substitute at Seymour Elementary in Flushing, the school principal told him that he had received his "PA 189 results" and that his services at the school would be terminated that day. (*Id*. at 25-26, App 87a-88a.) When the substitute-teacher placement service for whom Hecht was working received the PA 189 disclosure, it advised that the Genesee County schools no longer wanted to use his services. (*Id*. at 25, App 87a; Pl Ex 14, App 334a.)

Hecht never applied for another teaching position, even though the undisputed evidence showed that unprofessional conduct does not automatically disqualify a person from being employed as a teacher. Indeed, NHA itself has offered employment to persons who have had a PA 189 unprofessional-conduct response. (Unwin Tr 26-27, App 254a-255a.) But Hecht apparently concluded that no school would knowingly hire a teacher who made racist in-classroom comments. Instead of looking for other teaching jobs, Hecht secured full-time employment as a machine operator earning approximately $14 per hour. (Hecht Tr 26-27, App 88a-89a.)

Hecht sues NHA

In February 2010, Hecht sued NHA in the Genesee County Circuit Court, alleging that after he made racist remarks in a classroom full of third graders, NHA actually discriminated against him on the basis of his race, violating the Elliot-Larsen Civil Rights Act, MCL 37.2202. Specifically, Hecht alleged that his race was a substantial cause for NHA's decision to discharge him and that he was treated less favorably than similarly-situated African-American employees. (Compl ¶¶ 17-18, App 4a.)

Before trial, NHA moved to bar Hecht from introducing evidence relating to NHA's mandatory disclosure of Hecht's unprofessional conduct. The trial court denied the motion, holding that the disclosure was material to Hecht's claim of future economic damages. (Mot in Limine Hrg Tr 10, App 16a.) During trial, Hecht blamed his inability to find a new teaching position on NHA, which provided PA 198 reports that truthfully revealed Hecht's in-classroom racist remarks. (Hecht Closing 120-125, App 312a-317a.)

In July 2011, the case proceeded to trial by jury. At the close of Hecht's case, NHA moved for directed verdict. (Mot Directed Verdict Tr 110-114, App 146a-150a.) That motion was denied. (*Id*. at 114, App 150a.) The jury returned a verdict in favor of Hecht. The jury awarded Hecht damages for past economic loss in the amount of $50,120 and future economic damages in the amount of $485,000. (Jury Verdict Tr 4, App 322a.) The trial court entered judgment consistent with the jury's verdict on August 8, 2011. (8/8/11 J, App 335a.) The trial court entered an order awarding Hecht attorneys' fees and costs in the amounts of $117,075 and $6,527.92, respectively. (8/18/11 Order Granting Fees and Costs, App 337a.)

After the trial court entered judgment, NHA moved for judgment notwithstanding the verdict or, in the alternative, a new trial on liability because Hecht had failed to prove that his race caused his dismissal. NHA also moved for a new trial because the trial court had admitted evidence of NHA's required disclosures under the Michigan Revised School Code. (Br in Supp of Mot for JNOV 15-17, App 340a-342a.) The trial court denied NHA's motion, but did not agree with Hecht that there was direct evidence of discrimination. (Order Den Mot for JNOV, App 345a.) NHA timely appealed. (10/25/11 Claim of Appeal, App 347.)

The Court of Appeals' panel majority affirms

On appeal, NHA argued that the trial court erred by denying its motion for directed verdict and its JNOV motion. (NHA Appeal Br 34.) NHA argued that there was insufficient evidence to send the case to the jury or to support the jury's verdict that race was a motivating factor in Hecht's dismissal. Specifically, NHA contended that there was no direct evidence of discrimination presented at trial and no circumstantial evidence demonstrating that Hecht was treated differently from similarly situated African-Americans. (*Id.* at 23-26.) NHA also renewed its argument that the trial court had erred in allowing evidence of NHA's mandatory disclosure obligation under the Revised School Code. (*Id.* at 36-42.)

The panel majority rejected these arguments and affirmed. With respect to sufficiency of the evidence, the majority held that both direct evidence and circumstantial evidence supported the conclusion that race was a motivating factor in Hecht's dismissal. (COA Op 3-7, App 351a-355a.) The majority stated that direct evidence is " 'evidence which, if believed *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' " (*Id.* at 3, App 351a (emphasis added) (quoting *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001)).) The majority then said that the "only direct evidence of discrimination was a statement *attributed* to Caine-Smith." (*Id.* (emphasis added).) Still, the majority held Weaver's testimony concerning Caine-Smith's reaction when she reported Hecht's racist remarks and Caine-Smith's knowledge of racial bantering was sufficient to establish direct evidence of discrimination. (*Id.* at 3-5, App 351a-353a.)

The majority quoted the testimony, in full, that it believed required the conclusion that Hecht's race was a motivating factor.

> [Plaintiff's Counsel]: Did you bring that information to her attention?

> Weaver: I think I told her that, you know, those things do happen around here, but they were under different circumstances.
>
> [Plaintiff's Counsel]: How did she respond when you said, "those things do happen around here?"?
>
> Weaver: I—I think her point was that it happens amongst African Americans. And it's not the other way around. And this wh—and that this one was reported, someone was offended, and we had an obligation to follow up on it. [*Id.* at 3, App 351a (citing Weaver Tr 108-109).]

From this the majority concluded:

> There need be no inference drawn to understand that Caine-Smith's response was an acknowledgement that while racial bantering among African Americans occurred, it did not occur between a white person such as plaintiff and an African American, and in firing plaintiff for such bantering one could conclude that Caine-Smith was motivated at least in part by plaintiff's race. In other words, if *Weaver's interpretation* is believed by the trier of fact, it would demonstrate that plaintiff's race was at least a motivating factor in the employer's actions because if he were a black person saying that same comment to another black person, then he would not have been punished. Caine-Smith stating to Weaver that the situation was distinguishable because the incident was reported and someone was offended certainly is important, but it does not negate her previous statement. [*Id.* at 4, App 352a (emphasis added).]

The panel majority acknowledged that "Weaver's testimony constitutes a summation of what Caine-Smith *may have meant* rather than a statement of what Caine-Smith actually said," and was subject to "differing interpretations." (*Id.* (emphasis added).) Even though Weaver's summation was subject to differing interpretations, the majority concluded that it supported the jury's verdict. (*Id.*)

The majority further concluded that even assuming that what it found to be direct evidence did not exist, there was "sufficient circumstantial evidence that plaintiff was similarly situated to African American employees who had made racial remarks at school and to other employees who were not punished." (*Id.* at 7, App 355a.)

Addressing the evidentiary issue, the majority held that the trial court had not abused its discretion by admitting evidence and argument about NHA's required disclosures under Michigan law. (*Id.* at 7-9, App 355a-357a.) The majority acknowledged that the Revised School Code requires such disclosures and "provided for immunity from civil liability." (*Id.* at 7-8, App 355a-356a.) But it held that this immunity applied in actions based on the disclosure itself and did not bar the admission of the fact of such disclosures in a discrimination suit. (*Id.* at 8, App 356a.) The majority affirmed.

Judge Wilder's dissent

Judge Wilder vigorously dissented, concluding that "the trial court should not have submitted this case to the jury." (COA Dissent 1, App 359a.) First, Judge Wilder explained that the "plaintiff failed to present any direct evidence of discrimination." (*Id.* at 2, App 360a.) Judge Wilder noted that "[e]vidence is not direct evidence when its consideration may lead to different conclusions" because "if direct evidence is believed, it 'proves the existence of a fact in issue *without* inference or presumption.' " (*Id.* (quoting *Hall v United States Dep't of Labor*, 476 F3d 847, 854 (CA 10, 2007)).) Judge Wilder believed that "Weaver's testimony is not direct evidence of discrimination because it did not recount an actual statement by Caine-Smith." (*Id.* at 3, App 361a.) Indeed, "*[n]othing* in the record establishes what Caine-Smith actually said to Weaver, and Caine-Smith denied saying directly, or by implication, that statements made by African American employees should be treated differently than statements made by white employees." (*Id.*) "Weaver's testimony constitutes, at best, Weaver's *interpretation* of what Caine-Smith *may have meant* by what she said." (*Id.* (emphasis added).) Because Weaver's statement was subject to varying interpretations, the case "should have been evaluated by the trial court as a circumstantial-evidence case." (*Id.* at 4, App 362a.)

Judge Wilder then analyzed the case according to the traditional *McDonnell Douglas* burden-shifting approach. Under that analysis, Judge Wilder concluded that Hecht "failed to establish that defendant's stated reasons for terminating him were pretextual rather than legitimate and nondiscriminatory." (*Id.* at 5, App 363a.) In particular, Judge Wilder noted that Hecht failed to demonstrate that he "was similarly situated to any other employee who made racially-based remarks." (*Id.* at 6, App 364a.) The fact that NHA did not discipline African-American employees for racial remarks could not constitute discrimination when NHA "never received complaints about those remarks." (*Id.*) Furthermore, Judge Wilder found it significant that Hecht "failed to show he was similarly situated to any other employee who interfered with the investigation of an incident." (*Id.*) Accordingly, because Hecht had not presented direct evidence and failed to present sufficient circumstantial evidence to survive *McDonnell Douglas*' burden-shifting analysis, the case should never have been submitted to the jury.[2]

[2] Judge Wilder disagreed that NHA was not appealing the trial court's denial of its directed motion verdict in addition to the denial of its JNOV motion. (COA Dissent 7, App 365a; see also NHA Appeal Br 22, 34.) He noted that the standard of review for both was the same. (COA Dissent 7, App 365a.)

STANDARDS OF REVIEW

Appellate courts review decisions denying motions for directed verdict or judgment notwithstanding the verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). Directed verdict or JNOV is appropriate if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id.*

Appellate courts review a trial court's decision to admit evidence for abuse of discretion. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). "The trial court abuses its discretion when its decision falls outside [the] range of principled outcomes." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). An error of law is always an abuse of discretion. *Duncan*, 494 Mich at 723. Admitting evidence in error is also grounds for a new trial if refusal to do so is "inconsistent with substantial justice." MCR 2.613(A).

SUMMARY OF ARGUMENT

The Court of Appeals affirmed a half-million-dollar employment-discrimination judgment in favor of Hecht, a teacher who made a racist joke in a classroom in front of his students, then lied about it and tried to influence coworkers to do the same. Justice Jackson aptly summarizes this result: "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.' " *SEC v Chenery Corp*, 332 US 194, 214 (1947) (Jackson, J, dissenting). If NHA had done nothing in response to this incident, it risked liability for maintaining a hostile work environment. As Judge Wilder concluded in dissent, there was no direct or circumstantial evidence of discrimination here, and the trial court should have entered judgment in favor of NHA—not the teacher who made in-classroom racist remarks.

As explained in the argument below, this Court should hold that:

1. What a person thinks another person might have meant is not direct evidence of discrimination. Direct evidence is evidence that *requires* the conclusion that discrimination has occurred. One person's perception of another's intent, demonstrated by unidentified words, is inherently speculative and does not require the conclusion that discrimination occurred.

2. An ambiguous statement that is subject to multiple plausible interpretations, some of which are benign, is not direct evidence of discrimination. Again, an ambiguous statement that can reasonably be interpreted as discriminatory or benign does not *require* the conclusion that discrimination motivated a decision.

3. Under the *McDonnell Douglas* prima facie case, a person is similarly situated to the plaintiff only if the person is nearly identical in all relevant respects, including the type and severity of misconduct. No inference of discrimination should ever arise from treating individuals who engage in different misconduct differently.

4. Courts apply the same legal standard to determine whether a discrimination case fails as a matter of law to motions for summary disposition, directed verdict, and judgment notwithstanding the verdict. This is consistent with the Court's existing precedent and consistent with common sense, given that at each stage a court is addressing the same issue—whether the evidence so one-sided that a party is entitled to judgment as a matter of law.

Applying these holdings to this case requires reversal of the Court of Appeals' discrimination analysis and judgment in favor of NHA. Weaver's statements are not direct evidence because they are her subjective perceptions of what Caine-Smith meant, and even Weaver's recollections are ambiguous and could be benign. The Court of Appeals wrongly disregarded the traditional burden-shifting analysis, and then misapplied the prima facie case.

Hecht is not similarly situated to non-Caucasian paraprofessionals who made racial remarks, because none of those paraprofessionals made racial remarks in classrooms full of students that resulted in other employees complaining to management, and none of the paraprofessionals also tried to impede NHA's investigation. Indeed, it defies logic that NHA discriminated against Hecht by not disciplining other employees for unreported conduct.

In addition to the erroneous liability analysis, the Court of Appeals affirmed a damage award that was artificially inflated by NHA's statutory duty to disclose Hecht's unprofessional conduct to prospective school employers. The Court of Appeals so held despite the statutory protection NHA is supposed to enjoy in circumstances like this. Hecht is not unable to find another teaching job because NHA is doing what is required by state law; he cannot find another teaching job because schools do not knowingly hire individuals who make in-classroom racist jokes. Hecht is not entitled to enhance his damages on the theory that, but for NHA's statutory report, he would be able to conceal his racist misconduct. The Court should make clear that when an employer is required to report a former employee's misconduct to a prospective school employer, the evidence of that statutory report is inadmissible in any proceeding alleging the school wrongfully terminated the employee.

ARGUMENT

I. There was insufficient evidence to demonstrate that NHA fired Hecht because he is white, rather than because he made a racist comment and tried to interfere with NHA's investigation.

To prevail in this case, Hecht had to prove that NHA ended his employment *because of* his race. More specifically, Hecht had to prove that NHA terminated his employment because he is white, and not because he made a racist comment in a classroom of third graders and then attempted to interfere with NHA's investigation of that incident. To do so, Hecht relied on Weaver's ambiguous statement of her perception of what Ms. Caine-Smith meant when they were discussing racial comments made by other employees that were never reported, and on the fact that those employees were not disciplined. This evidence does not show that consideration of Hecht's race caused NHA to end his employment.

The Elliott-Larsen Civil Rights Act prohibits employers from discriminating against individuals because of race. MCL 37.2202(1)(a). ELCRA provides as follows:

> An employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight, or marital status. [*Id.*]

A plaintiff can prove intentional discrimination in violation of the ELCRA "by direct evidence or by indirect or circumstantial evidence." *Sniecinski*, 469 Mich at 132. Regardless of the method of proof, the plaintiff at all times has the burden to prove causation, that the employer made an adverse employment decision because of discriminatory animus. See *id*. at 134-135. "Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Id*. at 135. If the plaintiff relies on indirect evidence, causation is presumed subject to being rebutted by defendant's

articulation of a legitimate, nondiscriminatory reason for its employment decision. *Id.* (citing *Tex Dep't of Cmty Affairs v Burdine*, 450 US 248, 254 (1981)). Here, the Court of Appeals' panel majority erred when it concluded that Hecht proved discrimination by both direct and indirect evidence.

A. Hecht had no direct evidence of unlawful discrimination; what a person thinks another person's unidentified words mean does not directly and without inference prove unlawful animus.

The panel majority held that Weaver's deposition testimony about her *perception* of what Caine-Smith's unremembered words meant is "direct evidence" of discrimination. But Weaver's testimony requires a factfinder to infer what Caine-Smith actually said from what Weaver believed Caine-Smith's unremembered statement meant, and then determine which of various plausible meanings to give the unremembered statement. As Judge Wilder explained, this is not direct evidence that requires the conclusion that NHA discriminated against Hecht.

1. Direct evidence and the mixed-motive analysis.

Proving discrimination by direct evidence is the touchstone of the mixed-motive analysis adopted by the U.S. Supreme Court in *Price Waterhouse v Hopkins*, 490 US 228, 244 (1989), and by this Court in *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133 n 6; 666 NW2d 186 (2003).[3] "Mixed-motive analysis applies when the evidence shows that an

[3] While this case was pending on appeal, the *Price Waterhouse* analysis was rejected by the U.S. Supreme Court because the ordinary meaning of the word "because" requires but-for causation. *Univ of Tex SW Med Ctr v Nassar*, 133 S Ct 2517, 2524-2533 (2013); see also *Gross v FBL Fin Servs, Inc*, 557 US 167 (2009). Under federal law, mixed-motive analysis only applies to Title VII discrimination claims because Congress amended Title VII to authorize such claims. See 42 USC § 20003-2(m). There is no reason to believe that the Michigan Legislature intended to create a new mixed-motive liability standard for the ELCRA by using the word "because." Accordingly, the standard for direct evidence under ELCRA should be evidence which, if believed, requires the conclusion that but for unlawful discriminatory animus, the adverse employment action would not have occurred.

employer considered both a proscribed factor (say, race) and one or more legitimate factors (say, competence) in making a challenged employment decision." *Fernandes v Costa Bros Masonry, Inc*, 199 F3d 572, 580 (CA 1, 1999), abrogated by *Desert Palace, Inc v Costa*, 539 US 90, 101 (2003) (concluding that amendments to Title VII abrogated application of the *Price-Waterhouse* formulation of the mixed-motive analysis).

In *Price Waterhouse*, the Supreme Court addressed the issue of whether liability for discrimination under Title VII of the Civil Rights Act of 1964 arises where an unlawful animus is the but-for cause of an adverse-employment action, or merely a substantial or motivating factor. 490 US at 237-238. The Court splintered on this issue, with a plurality of justices concluding that unlawful discriminatory animus that is a motivating or substantial factor is sufficient. *Id.* at 241-242; *id.* at 265 (O'Connor, J, concurring). The dissenting justices rejected the motivating-factor analysis because Congress prohibited employers from taking adverse-employment actions "because of" prohibited discriminatory animus, 42 USC § 2000e-2(a), and "because of" means but-for causation. 490 US at 282 (Kennedy, J, dissenting). The dissenters observed that applying "[a]ny standard less than but-for, . . . simply represents a decision to impose liability without causation." *Id.*

Justice O'Connor's concurrence has typically been relied upon as setting forth the narrowest basis for the Court's decision, and thus has been treated as authoritative by the lower courts. *Fernandes*, 199 F3d at 580-581. She wrote that where a plaintiff's direct evidence shows that discriminatory animus was a substantial factor in an adverse employment action, the burden shifts to the employer to prove that it would have made the same decision without consideration of the unlawful factor. *Price Waterhouse*, 490 US at 276-277 (O'Connor, J, concurring). Justice O'Connor indicated that stray remarks, remarks by non-decisionmakers, and

remarks by decisionmakers that are unrelated to the process of making the decision at issue are not sufficient to shift the burden. *Id.* at 277. Instead, what is required is "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[4] *Id.*

After *Price Waterhouse*, the federal courts were vexed by the appropriate standard for direct evidence in mixed-motive cases. *Fernandes*, 199 F3d at 581. The more relaxed the standard for direct evidence, the easier it became for plaintiffs to shift the burden of proof to employers that they would have taken the adverse action even had the unlawful animus not been present. Thus, if direct evidence was interpreted to include any remarks by a decisionmaker that displayed a discriminatory animus, a plaintiff could be deemed to have "proved" causation even where the employer had a strong legitimate justification for the employment action. To prevent the mixed-motive analysis with its shift of the burden of proof to the employer from swallowing the burden-shifting *McDonnell-Douglas* analysis, most federal appellate courts applied the dictionary definition for direct evidence.

Under the standard adopted by most federal courts, direct evidence is evidence of discriminatory intent without resort to inference or presumption. *E.g.*, *Rahn v Bd of Trustees of N Ill Univ*, 803 F3d 285, 289 (CA 7, 2015); *Holland v Gee*, 677 F3d 1047, 1055 (CA 11, 2012); *Cinnamon Hills Youth Crisis Ctr Inc v Saint George City*, 685 F3d 917, 919-920 (CA 10, 2012); *Allen v Highlands Hosp Corp*, 545 F3d 387, 394 (CA 6, 2008); *Coghlan v Am Seafoods Co*, 413 F3d 1090, 1095 (CA 9, 2005); *Sandstad v CB Richard Ellis, Inc*, 309 F3d 893, 897 (CA 5, 2002); *Torre v Casio, Inc*, 42 F3d 825, 829 (CA 3, 1994). Accord e.g., *Williams v City of Burns*, 465

[4] Congress later amended Title VII to specifically impose liability where discriminatory animus is "a motivating factor for any employment practice, even though other factors also motivated the practice." 42 USC § 2000e-2(m).

SW3d 96, 113 n 16 (Tenn, 2015); *Estrada v Port City Props, Inc*, 258 P3d 495, 504 n 34 (Okla, 2011); *McFee v Nursing Care Mgmt of Am, Inc*, 931 NE2d 1069, 1076 (Ohio, 2010); *Ky Dep't of Corr v McCullough*, 123 SW3d 130, 135 (Ky, 2003). Under this standard, direct evidence is akin to an admission by an employer. *O'Leary v Accretive Health, Inc*, 657 F3d 625, 630 (CA 7, 2011). It must be so strong as to demonstrate that decisionmakers place substantial negative reliance on an illegitimate criterion in reaching their decision. *Connors v Chrysler Fin Corp*, 160 F3d 971, 976 (CA 3, 1998) (quoting *Price Waterhouse*, 490 US at 277 (O'Connor, J, concurring)). "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race], satisfy this criteria." *Sharp v Aker Plant Servs Group, Inc*, 726 F3d 789, 798 (CA 6, 2013); *Holland*, 677 F3d at 1055 (quotation omitted).

2. Direct evidence is that which requires the conclusion that discriminatory animus motivated the decision without inference or presumption.

This Court has already adopted the rigorous federal direct-evidence standard for ELCRA. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132-133; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). In *Hazle v Ford Motor Co*, the Court quoted the definition of direct evidence from the Sixth Circuit: " 'direct evidence' [is] 'evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' " 464 Mich at 462 (emphasis added) (quoting *Jacklyn v Schering-Plough Healthcare Prods Sales Corp*, 176 F3d 921, 926 (CA 6, 1999) (interpreting Michigan law)). Evidence that requires resorting to inference or presumptions does not meet this standard. *Brewer v New Era, Inc*, 564 F Appx 834,883 (CA 6, 2014); *Cecil v Louisville Water Co*, 301 F Appx 490, 496 (CA 6, 2008); *Laderach v U-Haul of NW Ohio*, 207 F3d 825, 829 (CA 6, 2000).

Until this case, the Michigan Court of Appeals has consistently been applying the direct-evidence standard the Court adopted in *Hazle* to require evidence that requires the conclusion, without presumption or inference, that unlawful discrimination was a motivating factor. *E.g.*, *Lundy v Thyssen Krupp Steel NA, Inc*, No. 294611, 2011 WL 149985 at *4 (Mich Ct App, Jan 18, 2011); *McCarthy v USA Credit Union*, No. 289014, 2010 WL 2629788 at *4 (Mich Ct App, July 1, 2010); *Dufour v William Beaumont Hosp*, No. 255773, 2006 WL 354997 at *2 (Mich Ct App, Feb 16, 2006). But here, the Court of Appeals majority concluded that evidence requiring inferences and subject to multiple interpretations is direct evidence. The Court of Appeals is wrong on both counts.

a. Weaver's belief about what Caine-Smith meant cannot be direct evidence that requires the conclusion that NHA discriminated against Hecht.

The panel majority concluded that the following testimony from Weaver is direct evidence: "I think her point was that it happens amongst African Americans. And it's not the other way around. And . . . that this one was reported, someone was offended, and we had an obligation to follow up on it." (Weaver Tr 109, App 143a.) As Judge Wilder explains in his dissent, Weaver's "constructed belief about what [Caine-Smith] meant when she made her unknown (to this record) statement" is not direct evidence. (COA Dissent 5, App 363a.) Simply put, an individual's mere belief about what a decision-maker meant is not the equivalent of evidence of what the decision-maker actually said. Only the latter can be direct evidence.

Weaver's testimony does not require the conclusion that Hecht's race substantially affected Caine-Smith's decision to end his employment. To reach that conclusion, a factfinder must believe that Caine-Smith actually said something that indicated a racially discriminatory

animus. And here, the factfinder did not even know what Caine-Smith said; Hecht's case was premised on a third party's statement of what the third party *thought* Caine-Smith meant.

To date, no one in this dispute has identified any precedent in which a court accorded "direct evidence" status to an individual's belief about what a decision-maker meant by a statement that was not even in the record. Hecht has cited no such authority, nor did the Court of Appeals. As Judge Wilder noted, the panel majority extended the scope of direct evidence "to conclude that direct evidence need not consist of evidence of what was *actually said* by the decision-maker, but may also encompass what the person hearing the decision-maker speak *thought* the decision-maker *meant.*" (COA Dissent 4, App 362a.) Were that the case, "the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, [and] virtually all defense motions for summary judgment in such cases would be doomed." *Mills v First Fed Sav & Loan Ass'n of Belvidere*, 83 F3d 833, 841-842 (CA 7, 1996) (citing *Visser v Packer Eng'g Assocs, Inc*, 924 F2d 655, 659 (CA 7, 1991)).

As Judge Wilder correctly anticipates, there are massive ramifications of the panel majority's extension of the direct-evidence doctrine to include a person's summation of what another person purportedly said. Consider a supervisor that tells an employee that she is firing him because of his performance. In opposition to the employer's motion for summary disposition, the employee submits an affidavit that, from the tone of his supervisor's voice, he believes that what she *meant* was that she didn't like him because his performance was outshining women in his department. That affidavit testimony would be direct evidence, and sufficient to survive summary disposition and force a trial. That result cannot possibly be right, yet it is the natural outcome of the panel majority's mistaken analysis.

The Court should reject the Court of Appeals' analysis because a person's perception of the meaning in the undisclosed words of another is not direct evidence of discrimination.

b. Weaver's testimony is not direct evidence because it does not require the conclusion that NHA discriminated against Hecht because he is white.

Weaver's testimony regarding what she perceived Ms. Caine-Smith to be stating is also not direct evidence because it is subject to varying interpretations. Ambiguous comments are not direct evidence.

As noted above, the federal courts of appeal, applying the direct-evidence standard this Court adopted in *Hazle*, have reasoned that "direct evidence of discrimination does not require a factfinder to draw *any* inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v Kroger Co*, 319 F3d 858, 864 (CA 6, 2003) (emphasis added). Instead, direct evidence "proves the existence of a fact in issue without inference or presumption." *Hall v United States Dep't of Labor*, 476 F3d 847, 855 (CA 10, 2007); *Jones v Bessemer Carraway Med Ctr* 151 F3d 1321, 1323 (CA 11, 1998). It is only because direct evidence is capable of proving discrimination without anything more that makes resort to inferences unnecessary. See *Harrison v Olde Fin Corp*, 225 Mich App 601, 610 n 10; 572 NW2d 679 (1997).

Ambiguous comments that could be either discriminatory or benign are not direct evidence. *Danville v Reg'l Lab Corp*, 292 F3d 1246, 1249 (CA 10, 2002). For that reason, federal appellate courts applying the same standard adopted in *Hazle* do not treat statements that "can plausibly be interpreted two different ways—one discriminatory and the other benign" as direct evidence because such statements "do[] not directly reflect illegal animus . . . ." *Hall*, 476 F3d at 855 (quotation omitted); *Patten v Wal-Mart Stores E, Inc*, 300 F3d 21, 25 (CA 1, 2002);

Merritt v Dillard Paper Co, 120 F3d 1181, 1189 (CA 11, 1997); see *Scheick v Tecumseh Pub Schs*, 766 F3d 523, 531 (CA 6, 2014) (Statement that the defendant wanted plaintiff to retire was not direct evidence because it "would require an inference to conclude that retirement was a proxy for age (as opposed to either years of service or a desire that he leave the position voluntarily).").

Weaver's belief about what Caine-Smith may have meant is subject to multiple plausible interpretations. It is not evidence that, if believed, *requires* the conclusion that Hecht's race caused NHA to end his employment. Indeed, the panel majority acknowledged "[i]t is true that Weaver's testimony constitutes a summation of what Caine-Smith *may* have meant rather than a statement of what Caine-Smith actually said. As such, it could reasonably be subject to differing interpretations." (COA Op 4, App 352a.) The panel majority noted that it was "equally plausible" that the point attributed to Caine-Smith could mean (1) that because Hecht is white, his racially charged comments should not tolerated in the way that comments by African Americans could be; (2) that Caine-Smith felt pressure to impose a stricter punishment on Hecht for his comments because he is white; or (3) that Caine-Smith was searching for an explanation as to why no one had complained in the past about racial bantering at the school. (*Id.*) Hecht offered an additional interpretation: that because racial bantering was prevalent at the school, Hecht's punishment should not be severe. (Closing Argument Tr 115, App 307a.) The meaning that Weaver imputed to Caine-Smith is thus ambiguous, and the panel majority should not have treated Weaver's testimony as direct evidence.

The panel majority decided that Weaver's testimony is direct evidence based on this Court's reasoning in *DeBrow v Century 21 Great Lakes Inc*, 463 Mich 534; 620 NW2d 836 (2001), that a statement that can reasonably be given multiple meanings can still be direct

evidence. (COA Op 4, App 352a.) In *DeBrow*, the Court stated that a remark that "may be subject to varying interpretations" was direct evidence of discrimination. 463 Mich at 538-539. In that case, the plaintiff's supervisor allegedly told the plaintiff that he was "getting too old for this shit" while firing him. *Id.* at 538. The Court reasoned that the remark could "reasonably be taken as merely an expression of sympathy that does not encompass a statement that the plaintiff's age was a motivating factor in removing him from his position," or it could evidence age animus. *Id.* But the Court later seemingly contradicted this conclusion by adopting the reasoning of the Court of Appeals' dissent by then Judge Young, which concluded that the statement at issue [c]learly . . . suggests that plaintiff's age was *a factor* in the mind of his employer at the point plaintiff was removed from his position." *Id.* at 540.

A statement reasonably subject to differing interpretations demonstrates that the statement is not the sort of evidence that, if believed, *requires* the conclusion unlawful discrimination was a substantial cause for the employment decision. Thus, to the extent that the statement in *DeBrow* is subject to multiple meanings, it is inconsistent with the standard for direct evidence that the Court later approved in *Hazle*. See *Hazle*, 464 Mich at 462. Accordingly, the Court should clarify the *DeBrow* decision to indicate that, consistent with *Hazle*, ambiguous comments are not direct evidence.

Here, Weaver's statement regarding what she thought Caine-Smith meant is ambiguous. A jury is not required to conclude that Caine-Smith was motivated by racial animus even if it believes that Weaver's impression was accurate. Moreover, Weaver's statement specifically reflects that Caine-Smith appropriately understood that when an employee claims racial harassment, an employer has a duty to investigate and take appropriate remedial action. See

Chambers v Trettco, Inc, 463 Mich 297, 311-312; 614 NW2d 910 (2000) (employers may avoid liability for a hostile work environment if they investigate and take prompt remedial action.)

The direct-evidence standard the Court adopted in *Hazle* has served the Michigan and federal judiciaries well as a tool for determining when an employment-discrimination plaintiff can proceed without the need for the inferences of the *McDonnell Douglas* analysis. The Court should reaffirm that standard, determine that Hecht did not present direct evidence of discrimination, and reverse the Court of Appeals' decision.

B. Hecht did not indirectly prove unlawful discrimination because his situation was not nearly identical in all relevant respects to the African Americans who allegedly made comments involving race.

In cases "involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973)." *Sniecinski*, 469 Mich at 133-134. The burden-shifting analysis applies when courts consider whether to grant motions for directed verdict or JNOV. See *id.* Accord *Simpson v Midland-Ross Corp*, 832 F2d 937, 940-945 (CA 6, 1987); *Rankin-Crosby v Dep't of Corr*, 2014 WL 2218735 at *3 (Mich Ct App, May 27, 2014).

Under Michigan law, the standard applicable to motions for summary disposition under MCR 2.116(C)(10), directed verdict, and JNOV are the same: viewing all of the evidence in the light most favorable to the non-moving party, is the movant is entitled to judgment as a matter of law. See *Sniecinski*, 469 Mich at 131. There is no dispute that when deciding motions for summary disposition or directed verdict in an employment-discrimination case based on circumstantial evidence, courts apply the traditional *McDonnell Douglas* burden-shifting analysis. That analysis is intended " 'to progressively sharpen the inquiry into the elusive factual question of intentional discrimination.' " *Hazle*, 464 Mich at 466 (quoting *Texas Dep't of Cmty*

Affairs v Burdine, 450 US 248, 256 n 8 (1981)). This analysis is useful at each step of the litigation to determine whether judgment as a matter of law is appropriate as the issue at each stage is the same. The Court of Appeals categorically rejected the application of the burden-shifting analysis to a motion for JNOV, inaptly citing what is effectively a dissent in the Sixth Circuit in a case addressing whether it is appropriate to instruct the jury on the burden-shifting analysis.[5] (COA Op 6, App 354a (citing *Brown v Packaging Corp of Am*, 338 F3d 586, 591 (CA 6, 2003) (Nelson, J, concurring)).) Some federal courts have suggested that the burden-shifting analysis does not apply after a jury verdict. E.g., *Noble v Brinker Int'l, Inc*, 391 F3d 715, 720-722 (CA 6, 2004) (citing *Reeves v Sanderson Plumbing Prods, Inc*, 530 US 133, 147-153 (2000); *St Mary's Honor Ctr v Hicks*, 509 US 502, 517-524 (1993)). But the federal courts ultimately conclude that evidence sufficient for a factfinder to conclude that an employer's legitimate, nondiscriminatory reason for its adverse-employment action are false (i.e. pretextual), plus a plaintiff's prima facie case, is a sufficient factual basis for a factfinder to determine that unlawful discrimination occurred. See *id.* In other words, the federal courts simply apply the burden-shifting analysis in reverse. And despite purporting to reject the application of the *McDonnell Douglas* analysis, the Court of Appeals immediately turned to the elements of the prima facie case to determine whether there was sufficient circumstantial evidence to support the jury's verdict. There is thus no reason for the Court to depart from its settled precedent that the burden-shifting analysis applies to motions for JNOV, just as it does to motions for directed verdict and summary disposition in employment-discrimination cases.

[5] In Michigan, it is not. *Hazle*, 464 Mich at 466-467. In the case the panel majority cites, the Sixth Circuit concludes that instructing the jury on the burden-shifting analysis may actually be useful and is not automatically reversible error. *Brown*, 338 F3d at 595-599.

The burden-shifting approach allows a plaintiff to obtain a presumption of discrimination by making out a *prima facie* case of discrimination. *Sniecinski*, 469 Mich at 133-134. To establish a rebuttable *prima facie* case of discrimination, a plaintiff must present evidence that "(1) she was a member of the protected class; (2) she suffered an adverse employment action; . . . (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of discrimination." *Lytle v Malady (On Reh'g)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff can make out a *prima facie* case, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* at 173. If the defendant articulates such a reason, the plaintiff bears the burden of showing that the defendant's reasons were a mere pretext for discrimination. *Id.* at 174.

There are two ways to demonstrate circumstances that give rise to an inference of race discrimination. A plaintiff can show that he was replaced by a person of a different race. See *id.* at 177-178 n 27 (quoting *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990)). Or a plaintiff can show that "similarly situated" coworkers of a different race were treated differently for engaging in the same or similar conduct. See *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). The evidence presented at trial demonstrates that Hecht was replaced by another white teacher. (Caine-Smith Tr 187, App 193a.) Accordingly, Hecht had to show that he was treated differently from similarly situated coworkers.

In *Town*, this Court explained that that for an employee to be similarly situated, "all of the relevant aspects" of the employee's employment situation must be "nearly identical." 455 Mich at 700. Naturally, this requires that the comparator employees are similarly situated in terms of job functions and positions. See *Lytle*, 458 Mich at 179. In the disciplinary context, to be similarly situated, "the plaintiff and his proposed comparator must have engaged in acts of

'comparable seriousness.' " *Wright v Murray Guard, Inc*, 455 F3d 702, 710 (CA 6, 2006) (quoting *Clayton v Meijer, Inc*, 281 F3d 605, 611 (CA 6, 2002)); see *Davis v Motorcity Casino*, No. 299505, 2011 WL 5966218 at *4 (Mich Ct App, Nov 29, 2011) (applying *Wright*).

Here, Hecht was not able to demonstrate that he was treated worse than similarly situated coworkers, because there were no similarly situated coworkers. Hecht did not identify any non-Caucasian coworker who interfered with an NHA investigation who was treated better than Hecht, nor any coworker who made racist remarks in front of a room full of schoolchildren. And although Hecht identified several different instances in which coworkers made racial comments, none of those situations is "nearly identical" to what Hecht did.

First, Hecht made his "joke" in a classroom full of third graders. There is no evidence that any of the other statements were made in a classroom. Only the comment Hecht attributes to a secretary involved a student. And even there, the comment did not involve a student in making a racist joke. It is hard to identify a more important distinction in a school setting than that this incident occurred in a classroom in the presence of students, with Hecht actually involving a student in his racist joke.

Second, NHA received reports from coworkers who were offended by Hecht's comments. Those reports triggered NHA's legal obligation to investigate and take prompt remedial action to prevent future misconduct by Hecht. See, e.g., *Radtke v Everett*, 442 Mich 368, 396-397; 501 NW2d 155 (1993). There is no evidence that offended coworkers reported any of the other incidents to NHA. Indeed, there is no evidence that coworkers were ever even offended by the other alleged comments.

Third, none of the other incidents involved teachers. The other incidents all involved paraprofessionals, aides, and a secretary.

Fourth, as the Court of Appeals' dissent explains, Hecht not only made racist statements in a classroom, he also interfered with NHA's investigation. (COA Dissent 6, App 364a.) Hecht "committed *two* terminable offenses and was fired, but he failed to present any evidence that any other employee committed two terminable offenses and was not fired." (*Id.* (emphasis added).)

Weaver's conduct in this case demonstrates the important differences between Hecht's conduct and the conduct of his purported comparators. Weaver testified that she was aware of racial banter among employees in non-classroom contexts, but never reported any of them to Caine-Smith. But when she learned of Hecht's comment in the classroom that offended other employees, she promptly reported the issue to Caine-Smith.

Even Hecht admits that he had not engaged in conduct similarly sanctionable to African Americans who made racial comments. During closing, Hecht admitted that his conduct was worthy of discipline by NHA (albeit he disagreed with the discipline imposed). Specifically, Hecht admitted that NHA was free to "have given [Hecht] a documented verbal reminder, could have given him a written warning, could have given him a final written warning, including a suspension from work." (Pl Closing Argument Tr 116-17, App 308a-309a.) And Hecht admitted that the comments made by other employees did not warrant discipline. (*Id.* at 110, App 304a.) If Hecht was similarly situated to the other employees who were not disciplined, *any* discipline of Hecht would arguably be disparate treatment. Hecht's concession that the other employees should not have been disciplined, but that NHA was entitled to discipline him, is an admission that he engaged in misconduct that was more severe, i.e., not similar, than the misconduct other employees are now alleged to have committed.

The panel majority concludes that there was "sufficient circumstantial evidence that plaintiff was similarly situated to African American employees who had made racial remarks at

school and to other employees who were not punished." (COA Op 7, App 355a.) To reach that conclusion, the panel majority only addresses the fact that, with regard to all of the earlier racial comments, no one ever complained to NHA. (*Id.*) And then the court illogically states that because *Weaver* had a duty to report earlier incidents to Caine-Smith but did not, *Caine-Smith and Unwin*, the decisionmakers here, treated Hecht differently than similarly situated paraprofessionals. The panel majority did not address the fact that Hecht made his racist joke in a classroom during instructional time, that Hecht's coworkers reported Hecht's racist comment (a fact not present with regard to any other instance of purported racial banter), or that Hecht not only made a racial joke in a classroom but that he also tampered with NHA's investigation of the incident. There is no evidence, circumstantial or otherwise, that any NHA employee who has engaged in such gross misconduct has not been fired. Accordingly, the Court of Appeals' decision in this case is inconsistent with the requirement in *Town* that a similarly situated coworker be nearly identical in all relevant respects. Consequently, Hecht never made out a prima facie case of race discrimination, and the evidence presented at trial fails to show that Hecht's race caused his termination, and NHA is entitled to JNOV.

II. The trial court abused its discretion by admitting evidence of and allowing argument about NHA's disclosure of Hecht's unprofessional conduct as required by MCL 280.1230b.

The lower courts allowed Hecht to argue to the jury that he was unable to hide his racist in-classroom remarks from potential school employers because NHA provided statutorily required disclosures to those potential employers. The Revised School Code requires schools to request, and previous employers to disclose, information regarding a potential employee's unprofessional conduct before the school can hire the person. MCL 380.1230b. To promote full and accurate disclosures, the Legislature provided broad immunity from any civil liability to the

disclosing employer and the receiving school. The panel majority nonetheless concluded that Hecht was entitled to use NHA's statutory obligation to increase his damages against NHA by arguing that NHA's obligations prevented Hecht from being entrusted with another teaching job. This decision eviscerates the immunity the Revised School Code purports to grant, and it resulted in a damages award in this case that does not comport with substantial justice.

The Legislature adopted MCL 380.1230b to promote the disclosure of information about unprofessional conduct by applicants for employments in Michigan schools. The Legislature broadly defined "unprofessional conduct" to include "1 or more acts of misconduct . . . ." MCL 380.1230b(8)(b). The statute imposes four obligations before a school may hire an applicant. MCL 380.1230b(1), (4). First, a school must obtain from an employment applicant a statement that authorizes his former and current employers to disclose unprofessional conduct and releases the former and current employers from any liability:

> [A] school district, local act school district, public school academy, intermediate school district, or nonpublic school shall request the applicant for employment to sign a statement that does both of the following
>
> (a) Authorizes the applicant's current or former employer or employers to disclose . . . any unprofessional conduct by the applicant and to make available . . . copies of all documents in the employee's personnel record maintained by the current or former employer relating to that unprofessional conduct.
>
> (b) *Releases the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing information described in subdivision (a)*, as provided in subsection (3) . . . . [MCL 380.1230b(1) (emphasis added).]

Second, the school must ask the applicant's current or last employer to disclose any unprofessional conduct. MCL 380.1230b(2). Third, an employer receiving the request is obligated to disclose unprofessional conduct when requested. MCL 380.1230b(3). Fourth, the school receiving the information is prohibited from using the information about unprofessional conduct

for any purpose other than evaluating whether to hire the applicant. MCL 380.1230b(5). The statute does not prevent a school from hiring an applicant whose unprofessional conduct is disclosed by a current or former employer. Indeed, evidence admitted at trial showed that NHA has hired individuals with a negative report.

The Legislature imposed broad protection for both requesting schools and disclosing employers to ensure that if they acted in good faith, they would not be burdened by litigation for fulfilling their legal duties. The Legislature not only required that an applicant release former employers "from any liability for providing information" about unprofessional conduct, MCL 380.1230b(1)(b), but also granted immunity to employers, MCL 380.1230b(3). Specifically, "[a]n employer . . . that discloses information under this section in good faith is immune from civil liability for the disclosure." MCL 380.1230b(3).

Here, Hecht released NHA from any liability for disclosing his unprofessional conduct to prospective employers. (NHA Br in Supp of JNOV Mot, Ex A, App 344a.) NHA complied with the law and accurately disclosed Hecht's racist in-classroom joke and efforts to tamper with NHA's investigation. (Unwin Tr 24-29, App 252a-256a.) Hecht has never suggested that NHA acted in bad faith. But he nonetheless has argued that he was entitled to use NHA's disclosure to demonstrate why he will never again be able to obtain a teaching job and, consequently, why his wage-loss claims should extend until he reaches retirement age several decades from now. (Pl Closing Argument Tr 120-125, App 312a-317a.) Indeed, Hecht argued to the jury that the statutorily required disclosures "branded [him] with the scarlet letter of racism" meaning "he'll never find a job as a teacher again." (*Id.* at 124-125, App 316a-317a.) Hecht emphasized that "[he] and his little family groan with the anguish of what happened here. Every time he tries to get on his feet, [NHA] kick[s] him back down again with these [statutory disclosures]." (*Id.* at

126, App 318a.) The jury evidently agreed with Hecht's closing argument because it awarded him front pay of $485,000, representing the wage differential between his job at NHA and his subsequent job as a machine operator, calculated over more than 22 years. (Jury Verdict Tr 4, App 322a.)

Hecht's argument and evidence of NHA's disclosure of his unprofessional conduct should not have been admitted because it imposed liability on NHA for its mandatory disclosure. If Hecht is branded with a scarlet letter of racism, it is because of what *he* did—*not* NHA's statutorily-required disclosure. Hecht's unprofessional conduct, not any NHA purported violation of ELCRA, led schools to conclude that they should not entrust their students to a teacher who thought it was funny to suggest "burning all the brown ones" in a classroom full of schoolchildren. The imposition of damages for 22 years in this action because Hecht cannot find another teaching job is "liability for providing the information" to other schools—i.e., liability for the disclosure. Contra MCL 380.1230b(1)(b), (3).

The Michigan courts have applied the same approach to other statutes granting immunity for disclosing information required by law. In *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722; 373 NW2d 204 (1985), the court reasoned that the immunity granted by MCL 722.625 to individuals who, in good faith, report child abuse included immunity from damages for shame and humiliation based on the filing of an incorrect child-abuse report in an action for medical malpractice. The plaintiff was seeking to enhance her damages for purported medical malpractice by citing the child-abuse report. The court explained that if such consequential damages were available in a malpractice action, they would defeat the public policy behind the statutory immunity and create a catch-22 for physicians faced with civil liability if they erroneously file an incorrect report, and criminal liability if they fail to file. *Id.* at 727-728.

The same is true here if Hecht can recover consequential damages in his ELCRA suit based on the effect of the statutorily-required disclosure of his unprofessional conduct. Allowing Hecht to use NHA's statutorily mandated disclosures to enhance damages imposes liability against NHA for making those disclosures. This can be best understood by considering what would have happened if the school district for which Hecht was seeking employment had learned of his racist comment from a parent of one of the students in his classroom at NHA. The school district would undoubtedly had reached the same conclusion—good schools do not employ people who tells racist jokes in classrooms full of students—but no one could claim that the wage differential between a teacher's salary and a factory worker's wages was NHA's fault. Because state law requires NHA to disclose Hecht's unprofessional conduct, NHA is being held responsible for the effect of that disclosure. That is exactly opposite the immunity the Legislature intended to provide. Accordingly, imposing additional damages on NHA because of the effect of the statutory disclosure is unlawful.

In reaching the contrary conclusion, the panel majority made two critical mistakes. First, the majority limited the immunity from "any liability" for disclosing unprofessional conduct to actions against an employer for the disclosure itself. (COA Op 8, App 356a.) As discussed above, the plain statutory language is not so limited. It applies to "*any* liability from providing information" about unprofessional conduct. MCL 380.1230b(1)(b) (emphasis added). The liability imposed here is liability that arises from the disclosure, just as consequential damages in a malpractice action for filing an incorrect child-abuse report arise from the report. The panel majority's decision frustrates Michigan public policy promoting the disclosure of unprofessional conduct by applicants for employment by schools.

The panel majority erred a second time by failing to acknowledge that Hecht's inability to find another teaching job was the result of his unprofessional conduct, not NHA's decision to end Hecht's employment. (COA Op 8, App 356a.) The court justifies Hecht's testimony and argument about the statutory disclosures as a preemptive attack on any argument that Hecht failed to mitigate his damages. (*Id.*) But the damages of which Hecht complains are the result of his own conduct and cannot be imposed on NHA under MCL 380.1230b. (Given the tenor of Hecht's attacks on NHA for complying with its statutory duties, characterizing Hecht as having introduced the evidence to rebut any argument that he failed to mitigate his damages is strained.)

In response to NHA's Application, Hecht raised several arguments. First, Hecht argued that panel majority's analysis is consistent with *Brunson v E & L Transport*, 177 Mich App 95; 441 NW2d 48 (1989). There, the defendant employer failed the plaintiff on a truck-driving assessment because she was a woman, then claimed that it could not give the plaintiff a truck-driving job under federal law because she failed the test. The thrust of the plaintiff's complaint was that if the test had been fairly administered, she would have passed. In stark contrast, Hecht admits that he actually made the racist joke that makes him anathema to other schools. Hecht's own conduct—not any purported discrimination by NHA—is what caused the problem; yet it is NHA's *duty to disclose* that conduct that Hecht used to enhance his damages.

Second, Hecht contended that if he is not allowed to use NHA's duty to disclose against NHA, he will be unable to show that he attempted to mitigate his damages. Hecht could demonstrate his efforts to mitigate by explaining that he applied to various schools, but when they learned that he had made a racist joke in a classroom (without explaining the source), they refused to give him any additional consideration. In other words, simply applying MCL 380.1230b's plain language does not do any injustice to Hecht. This is unpalatable to

Hecht because it highlights that his inability to find another teaching job is based on his own misconduct, demonstrating the severity of his wrongdoing.

Third, Hecht suggested that the trial court's special instruction regarding MCL 380.1230b remedied any error. But the special instruction did not tell the jury that Michigan law immunizes NHA from liability resulting from the statutory reporting requirements. The trial court's error resulted in the very thing—heightened liability—that MCL 380.1230b was designed to prevent.

Fourth, Hecht contended that any error here was harmless because the one teaching job he actually applied for had a starting salary similar to the hourly manufacturing job he eventually found. But the starting salary of one teaching job does not demonstrate that working in manufacturing, and not in Hecht's chosen field, was the appropriate measure for damages.

In sum, the panel majority's decision nullifies the broad immunity that the Legislature granted to schools and employers for complying with the disclosure requirements of the Revised School Code. The decision in this case is the only one that interprets the scope of the immunity granted under MCL 380.1230b. If allowed to stand, the majority's atextual interpretation of the statutory immunity is effectively precedential despite its unpublished status. The Court should therefore reverse, and remand the case for a new trial.

CONCLUSION AND REQUESTED RELIEF

When an employer is forced to pay more than half a million dollars for firing a teacher who made racist remarks in front of a classroom full of third-grade children, lied to his supervisors about the incident, and encouraged witnesses to lie as well, something is obviously amiss. What is amiss here is the panel majority's view of Michigan employment law, a view that (1) conflates direct and circumstantial evidence, (2) ignores the requirement that an employee be treated differently than "similarly situated" employees, and (3) essentially strips the Revised

School Code's immunity provision of any applicability in a teacher termination. As explained at length above, the Court of Appeals' decision will have implications far beyond the circumstances of this case.

Accordingly, NHA respectfully requests that the Court hold that:

1. What a person thinks another person might have meant is not direct evidence of discrimination.

2. An ambiguous statement that is subject to multiple plausible interpretations, some of which are benign, is not direct evidence of discrimination.

3. Under the *McDonnell Douglas* prima facie case, a person is similarly situated to the plaintiff only if the person is nearly identical in all relevant respects, including the type and severity of misconduct.

4. Courts apply the same legal standard to determine whether a discrimination case fails as a matter of law to motions for summary disposition, directed verdict, and judgment notwithstanding the verdict.

5. And when an employer is required to report a former employee's misconduct to a prospective school employer under MCL 380.1230b, evidence of that statutory report is inadmissible in any proceeding alleging the school wrongfully terminated the employee.

Consistent with these holdings, the Court should reverse and direct that judgment notwithstanding the verdict be entered in favor of NHA or, if NHA prevails only on the damages issue, remand for a new trial.

Respectfully submitted,

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